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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 37

STATE OF LOUISIANA AND LOUISIANA PUBLIC SERVICE COMMISSION, appellants

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted District Court (R. 1157) is reported in 41 F. (2d) 293. The original report of the Interstate Commerce Commission (R. 15) is reported in 155 I. C. C. 247 and its supplemental report (R. 70) in 157 I. C. C. 498.

JURISDICTION

The final decree of the District Court was entered June 11, 1930. (R. 1159.) Petition for appeal was filed July 7, 1930, and was allowed the same day. (R. 1160, 1165–1166.)

The jurisdiction of this Court rests on the Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (U. S. C. Title 28, Sec. 47), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C. Title 28, sec. 345).

QUESTIONS PRESENTED

I. Whether the finding of the Interstate Commerce Commission that intrastate rates on sand, gravel, and related commodities in Louisiana west of the Mississippi River (hereinafter referred to as western Louisiana) lower than the corresponding rates approved by it for interstate application between points in the Southwest would result in undue prejudice to interstate shippers and unjust discrimination against interstate commerce is supported by evidence and adequate collateral findings.

II. Whether the allowance authorized by the Commission to cover the cost of ferry service on transportation between western Louisiana and points in Louisiana on the east bank of the Mississippi River is invalid either because it constitutes an unconstitutional preference of Texas ports, or because it is governed by Section 15 (6) of the Commerce Act, or because it is not supported by the evidence and findings.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in Appendix A, *infra*, pp. 39–42.

STATEMENT

This is an appeal from a decree of the United States District Court dismissing a bill filed by the Louisiana Public Service Commission and the State of Louisiana to set aside that part of an order of the Interstate Commerce Commission which required Louisiana carriers to maintain rates on the transportation of sand, gravel, and related commodities between points in western Louisiana and between western Louisiana and certain Louisiana points on the east bank of the Mississippi, which should be no lower, distance considered, than the interstate rates contemporaneously applicable to the transportation of these commodities between points in western Louisiana and these east river bank points, on the one hand, and points in Arkansas, Oklahoma, and Texas, on the other hand.

The proceeding was initiated by two complaints (Nos. 16002 and 18702) filed with the Interstate Commerce Commission by two Arkansas producers, alleging that the Louisiana intrastate rates on sand, gravel, and crushed stone were on a lower basis than the Arkansas-Louisiana rates and were unduly prejudicial to and discriminatory against interstate commerce in sand and gravel, in violation of Sections 3 and 13 of the Interstate Commerce Act. (R. 278–285, 324–327.) The Louisiana Public Service Commission and the Louisiana Highway Commission intervened in support of the Louisiana rates. (R. 273, 292, 328.) After a partial hearing

and after the Interstate Commerce Commission had reopened for further consideration the interstate rates on sand and gravel prescribed in *Memphis-Southwestern Investigation*, 77 I. C. C. 473 (hereinafter referred to as No. 9702), the Commission assigned its *Rate Structure Investigation*, No. 17000, which it had instituted pursuant to the joint resolution of Congress known as the Hoch-Smith resolution (43 Stat. 801), for hearing in connection with further hearings in Nos. 9702, 16002, and 18702. (R. 17–18.) The portion of No. 17000 (designated Part 11, Sand and Gravel) set down for hearing related to the interstate and intrastate rates under Section 13 of the Interstate Commerce Commission Act on sand, gravel, and related commodities between points in Arkansas, Oklahoma, Texas, and Western Louisiana (but including both banks of the Mississippi River bordering on Arkansas and Louisiana). (R. 18.)

Representatives of the railroad commissions of Arkansas, Louisiana, Oklahoma, and Texas participated in the subsequent hearings. (R. 19.) Proceedings involving intrastate rates on the same commodities within these four States, which were pending before the respective State commissions, were heard jointly under the cooperative plan. (R. 19.) Evidence previously taken by the Texas Commission on Texas intrastate rates on sand and gravel was incorporated in the record. (R. 1172.)

At a joint conference of the interested carriers, State highway commissions and producers it was

unanimously agreed prior to the taking of testimony that it was the sense of the conference:

> that the same basis or level of rates shall apply for general application on the commodities contained in the commodity description heretofore agreed upon throughout the general territory covered by these proceedings, except that it is the position of the carriers that such scale should be made having regard to the varying operating and transportation conditions existing in such territory. (R. 444, 446.)

The carriers subsequently did not insist on their reservation and proposed a schedule of rates to be applied without territorial limitations. (R. 625–627.) The State highway commissions and producers had previously advised the Commission that they were in agreement, after conference, that the same level of rates should apply throughout the territory covered by the proceedings. (R. 446, 448.)

When these agreements were introduced the Louisiana Highway Commission expressed no reservation or objection. At that time the Arkansas Highway Commission and Little Rock Chamber of Commerce withdrew from the agreements, their position being that transportation conditions in Arkansas were more favorable than in the Southwest as a whole. (R. 20, 451.) After the Louisiana Highway Commission had presented its testimony, its representative stated that it ad-

hered to the agreement only on the condition that the scale of rates proposed by the State highway commissions and producers was adopted. (R. 433, 602, 604.) This scale is hereinafter referred to as the shippers' proposed scale.

The principal commodities covered by the investigation are sand, gravel, crushed stone, shells, and chat, all of which, it was agreed, should take the same rates. (R. 20.) They are used chiefly in the building of highways and in concrete construction. (R. 20.) Since freight rates thereon represent a substantial part of the cost of improved highways, the Arkansas, Louisiana, Oklahoma, and Texas highway commissions were represented and took an active part in the proceedings. (R. 20.) The hearing developed into a controversy between State highway commissions and the carriers. (R. 54.) Producers and other shippers, except the Arkansas interests in Nos. 16002 and 18702 who asserted prejudice and discrimination because of the disparity between Louisiana intrastate rates and Arkansas-Louisiana interstate rates, took almost no part in the proceeding. The shippers' proposed scale appears to have been prepared by a traffic expert employed by the Louisiana Highway Commission. (R. 478, 493, 517.) Not a single Louisiana producer testified. A questionnaire sent to more than 100 southwestern producers to obtain data for presenting their case to the Commission was answered by only three Louisiana producers

doing business in western Louisiana. (R. 785, 801, 804, 806.)

There are at least 300 points, and probably many more, scattered throughout the territory investigated where one or more of the considered commodities are produced. (R. 23.) In western Louisiana practically no gravel is produced south of a line across the State about 20 miles south of Alexandria, crushed stone is produced only at one point in the north central part of the State, and oyster shells are secured only at two cities on the coast. (R. 23, 474.) Exhibit A–5,[1] although incomplete, shows the location of many of the plants which produce road-building materials. With respect to traffic as affected by the various points of production, the Commission said:

> Each of the Southwestern States produces sufficient amounts of these commodities for its own use and it is perhaps not far from correct to state that at least 90 per cent of the movement is intrastate. There is, however, an interstate movement from points in adjoining States near the border and it is the desire of each producing point to have rates which will permit it to ship and compete in territory that can not be profitably

[1] This exhibit is not printed in the record, but is one of the exhibits copies of which have been bound together and filed with the clerk of this Court for distribution to each Justice. (R. 1174.) The abbreviation, Ex. or Exs., will be hereinafter used to designate exhibits appearing in this bound volume.

reached under the present various rate adjustments. (R. 23.)

The Commission found that taking the territory as a whole the rates prescribed in No. 9702 "may be considered as the standard on interstate movements of this traffic in the Southwest." (R. 25.) It also found that the rates prescribed in No. 9702 are substantially the same as those prescribed in *Railroad Commission of Louisiana* v. *A. H. T. Ry. Co.*, 48 I. C. C. 312, for application between Shreveport, La., and points in Texas and in *Natchez Chamber of Commerce* v. *L. & A. Ry. Co.*, 58 I. C. C. 610 (hereinafter referred to as the *Natchez case*), for application between Natchez, Miss., and points in western Louisiana, subjected to later general increases and decreases. (R. 24.)

As a result of the Commission's order in No. 9702, in connection with a supporting injunction issued by a Federal court, the 9702 scale applied on intrastate traffic in Arkansas. (R. 25.) The Oklahoma intrastate scale was somewhat lower and the Missouri intrastate scale slightly lower than the 9702 scale. (R. 26.) The intrastate scale prescribed by the Texas Commission in June, 1927, which was lower than the 9702 scale, had been reopened by that commission. (R. 26.) Concerning Louisiana rates the Commission said:

> There are three different intrastate scales applying on this traffic within western Louisiana. The 9702 scale applies on what may be termed commercial shipments.

There are two lower scales required to be maintained by orders of the Louisiana Commission, one known as the municipal scale, which applies on shipments consigned to the proper municipal officer to be used in the construction of public buildings such as courthouses and buildings of like public nature. Comparatively little traffic moves on this scale. The third, which is the lowest of the three scales, is known as the good-roads scale. This scale applies on shipments to be used in the construction of parish and State public roads, or in the construction of streets, when such shipments are consigned to, and the freight charges are paid by, the Federal, State, parish, or municipal government. This good-roads scale moves most of this traffic, probably from 80 to 85 per cent, in western Louisiana. (R. 25.)

In Louisiana material used in the construction and maintenance of highways is purchased directly by the Louisiana Highway Commission, which pays the freight from point of origin to point of delivery. (R. 20.) This Commission both constructs and maintains the improved highways of the State although some additional construction is done by parishes. (R. 21, 459–460.) Louisiana is the only State in the Southwest which at the time of the hearing maintained municipal or good-roads rates. (R. 25.)

About 98 per cent of the improved highways in Louisiana are constructed with gravel, that is, without concrete base or hard-surfaced top. (R. 21.)

These so-called gravel roads are made either from washed gravel, in which case clay from along the roadside is mixed with the gravel as a binder, or clay gravel. (R. 22, 462.) From 98 per cent to 99 per cent of the highway construction in western Louisiana requires a railway haul on gravel. (R. 464–465.) The state highway engineer of Louisiana testified that, in his opinion, a change in the freight rates would not change the source of supply of road-building materials in western Louisiana because there is no likelihood of gravel plants being developed in new localities in that region. (R. 456, 469.) From October 1, 1925, to October 1, 1926, a representative year, over 740,000 tons of road-building material was shipped by freight to the Louisiana Highway Commission in western Louisiana. (R. 466, 482–483.) The freight charges on these shipments were $491,128.37. (R. 483.)

The carriers' proposed single-line scale was based on 8.5 per cent of the first-class scale recently prescribed by the Commission for application between points in the Southwest. (R. 38.) They explained that the 8.5 per cent was determined by following the formula used in the *Natchez case*, where Class B rates were made 25 per cent of the first-class rates and rates on sand and gravel 35 per cent of Class B, or 8.75 per cent of first-class rates. (R. 39.) This the carriers treated as 8.5 per cent. (R. 39.) Their proposed joint-line scale was 20 cents to 30 cents per ton higher and both their scales provided for an allowance for bridge or ferry service

on transportation to or from points on the east bank of the Mississippi River. (R. [illegible]) All parties agreed that separate single-line and joint-line scales should be adopted. (R. 20.)

The carriers supported the reasonableness of their proposed single-line scale by comparison with various interstate and intrastate rates on sand and gravel, particularly those prescribed in *Rates on Chert, Clay, Sand, and Gravel*, 122 I. C. C. 153 (hereinafter called the *Southeastern* case), for application in Southeastern territory and those prescribed in *Penn. Sand & Gravel Prod. Assn. v. B. & O. R. R. Co.*, 104 I. C. C. 717, for application from western Pennsylvania to various destinations in central territory. (R. 40.) The carriers introduced in evidence tables showing the percentage relation of various sand and gravel rates to first-class rates,[1] as well as statistical evidence tending to show less favorable transportation conditions in the Southwest than in the Southeast and in central territory.[2] Their exhibits also compared the car-mile revenue under their proposed scale with the car-mile revenue under the southwestern class scale, the 67C2 scales on salt and pig iron, and various intrastate rates on such low-grade commodities as junk, scrap iron, rough stone, logs, cottonseed hulls and logs. (R. 42–43.)

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[1] See Exhibits A–38 (R. 1035), A–45 (R. 1037), A–46 and A–50 to A–53 (R. [illegible]).

[2] See Exhibits A–36 (R. 1033), A–37 (R. 1035), A–107 (R. 1050), A–115 (R. 1057), A–170 (R. 1144).

The Commission found that the commodities under investigation constitute 11.09% of the total tonnage handled by Class I roads in the southwestern region in 1936; that this tonnage produced a substantial part of the revenue of these carriers; that few other commodities enjoy rates as low; that the carriers' proposed scale would, if universally applied in the Southwest, undoubtedly result in a material increase in their revenue; that the shippers' proposed scale, although higher than the Louisiana good-roads scale, was too low for general application in the Southwest and was, in fact, lower than any rates on this traffic in any territory prescribed by the Commission in recent years; that transportation conditions in the Southwest are sufficiently similar to warrant a universal scale of rates throughout Arkansas, Oklahoma, southern Missouri, western Louisiana (including both banks of the Mississippi River), and common-point territory in Texas. (R. 22, 51, 54, 55, 69.)

The Commission said that the record disclosed a rate situation affecting both interstate and intrastate transportation of these commodities in the Southwest that needed correction, and that [illegible] is warranted in a reasonable scale [illegible] uniformly applied throughout [illegible] (R. 69.)

It concluded that the level of [illegible] applying on these commodities in [illegible] was somewhat too high and should [illegible] lowered. (R. 54.)

The Commission found that the [illegible] joint-line scales set forth in the [illegible] mum reasonable rates for interstate transportation of sand, gravel, and related commodities between points in Arkansas, Oklahoma, Texas, and western Louisiana. (R. 56, 62.) It also found that the same scales, plus 6¢ a ton for the river crossing at Vicksburg, Miss., and plus 6¢ a ton for the river crossings south of Vicksburg, were maximum reasonable rates for interstate transportation between points in Arkansas, Oklahoma, Texas, and western Louisiana and points on the east bank of the Mississippi bordering Arkansas and western Louisiana.* (R. 56, 62.) In Nos. 10007 and 10418 the Commission found that rates from western Louisiana to destinations in Louisiana located on and north of the line of the Vicksburg, Shreveport & Pacific Railway from Vicksburg, Miss., to Shreveport, La., would, if lower than the corresponding rates from Arkansas [illegible]

*By reason of the [illegible] solidated therewith (Nos. 9890, [illegible] 10418, 10419) the Commission's findings [illegible] included transportation from St. Louis [illegible] Mo., to points in Arkansas and in Shreveport, Alexandria, La., and transportation from [illegible] Southern Missouri. (R. 56.)

River Siding, Ark., to said Louisiana destinations, result in undue prejudice to shippers from said Arkansas points, and unjust discrimination against interstate commerce. (R. 57.)

The Commission reported that the Arkansas, Oklahoma, and Texas Commissions were approving the same bases of rates for intrastate application within those States, respectively, as those which it was approving for interstate application, but that the Louisiana Commission was not willing to authorize such rates for intrastate traffic in western Louisiana. (R. 58–59.) The undue prejudice and unjust discrimination found to exist in Nos. 16002 and 18702 the Louisiana commission was willing to remove by establishing rates on traffic from western Louisiana to destinations in northern Louisiana on a level with the Arkansas-Louisiana rates. (R. 58–59.)

The Commission found that the Louisiana good-roads rates averaged 35% lower than the interstate rates which it was therein approving.* (R. 59.) It found that if the latter rates had been applied on intrastate shipments in western Louisiana to the Louisiana Highway Commission during the period from October 1, 1926, to October 1, 1927, more than $100,000 in additional freight charges would have been collected. (R. 59.) It found that mainte-

*For convenient comparison we have printed these two scales in Exhibit B, infra, p. 43. This exhibit shows, for each ten-mile block up to 200 miles, the percentage by which the good-roads scale is lower.

names of [illegible] gravel and [illegible] western Louisiana (including east river bank points) than the corresponding [illegible] these commodities between points in [illegible] Louisiana and points in Arkansas, Oklahoma and Texas would result in undue preference of shippers in such intrastate commerce and undue prejudice to shippers in such interstate commerce and in unjust discrimination against interstate commerce. (R. 60-61.) The Commission also found that this undue prejudice and unjust discrimination could and should be removed by applying the rates approved by it for intrastate transportation to transportation between points in western Louisiana (including east river bank points). (R. 60-61.)

None of the eleven Commissioners dissented from the findings with respect to Louisiana intrastate rates. Two Commissioners believed that the maximum rates approved were too low. (R. 61-62.)

The Commission entered an order which prescribed maximum interstate rates and minimum Louisiana intrastate rates in accordance with the findings.* (R. 64-67.) After the Louisiana Rail-

*By a supplemental report and order the Commission excepted from the original order rates between certain points on the Mississippi River. (R. 68-70.) None of the parties objected to this exception and it is not involved in the present controversy.

lic Service Commission had denied the carriers permission to file intrastate rates in conformity with this order the carriers brought suit in the United States District Court for the Eastern District of Louisiana to enjoin that commission from interfering with compliance with the order. (R. 1, 8, 13.) The Louisiana commission and the State of Louisiana then filed a bill in equity in the same court to set aside the order of the Interstate Commerce Commission. (R. 162.) The District Court heard the two cases together and held that there was substantial evidence to sustain the order and that it was well within the authority of the Commission. (R. 1157–1159.) Appeals in the two cases (Nos. 36 and 37) are to be heard by this Court upon the same record.

SUMMARY OF ARGUMENT

I. The Commission, after an exhaustive investigation, fixed a scale of maximum rates for the interstate transportation of sand and gravel in the Southwest. This scale, which was lower than the prevailing interstate rates in the Southwest and lower than the scale maintained by the Louisiana Public Service Commission on commercial shipments in western Louisiana, was accepted for intrastate application by three State commissions, but was rejected by the Louisiana commission. The Interstate Commerce Commission found that the Louisiana good-roads scale, which moves 30% to

85% of the traffic in western Louisiana moved at 35% lower than the interstate would relate to under approving, and that transportation conditions throughout the Southwest were substantially similar. It found that unjust discrimination against interstate commerce would result from continued maintenance of lower intrastate rates in western Louisiana. Since there was an adequate showing that the higher State rates authorized by the Commission's order would materially increase carrier revenue, we submit that this case is governed by *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563. This Court has not departed from the doctrine there announced that the effective operation of the Interstate Commerce Act requires that intrastate traffic pay a fair proportionate share of the cost of maintaining an adequate railway system, and that if this purpose is interfered with by a disparity of intrastate rates the Commission is authorized to end this disparity by directly removing it.

II. The Commission's determination that on interstate and intrastate traffic to and from Louisiana points on the east bank of the Mississippi River carriers were entitled to an allowance to cover the cost of ferry service is not an unconstitutional preference of Texas ports over Louisiana ports. The record does not show that transportation to and from Texas ports requires a similar ferry service. Section 15 (6) of the Commerce

Act also does not apply to this part of the Commission's order because the order does not prescribe any division of the river-crossing allowance among the carriers participating in the transportation. Appellants likewise can not attack the allowance as unsupported by evidence. On the original hearing in No. 9702 the Commission prescribed a river-crossing allowance for transportation to and from Louisiana east river bank points. In the present proceeding it reopened No. 9702 and adopted a lower allowance. Since appellants offered no evidence of a change in conditions, the Commission might have retained the same allowance in the supplemental proceeding. Appellants, who desire to have the river-crossing allowance eliminated, can not complain because the Commission granted a part of their request and lowered the allowance.

ARGUMENT

I

THE ORDER OF THE INTERSTATE COMMERCE COMMISSION PRESCRIBING INTRASTATE RATES IN WESTERN LOUISIANA FOR SAND, GRAVEL, AND RELATED COMMODITIES LOWER THAN THE INTERSTATE RATES APPROVED BY IT FOR TRANSPORTATION OF THESE COMMODITIES BETWEEN POINTS IN THE SOUTHWEST IS VALID

The purpose of the Interstate Commerce Commission in this proceeding was to establish rates on sand, gravel, and related commodities within the Southwest which should conform to the requirements of the Interstate Commerce Act. As hear-

ing upon the validity of the order [illegible] mission entered, we shall deal to [illegible] the comprehensiveness of the [illegible] vestigation and findings [illegible] quired [illegible] and made findings [illegible] nature of the traffic, the [illegible] from, the extent and character of [illegible] and the sources of supply, the interstate and intrastate rate structures, both in the Southwest and in other regions, and the similarity of transportation conditions throughout the Southwest. Since the Commission's ultimate determination that the low Louisiana intrastate rates were unduly prejudicial to interstate shippers and unjustly discriminated against interstate commerce rests largely upon the many factors affecting [illegible] modities in the Southwest, we [illegible] a few of the Commission's findings and certain supporting evidence.

The Commission found that these commodities move in great volume in the Southwest and [illegible] a substantial part of the carriers' revenues; that in 1925 they constituted over 11% of the total tonnage of Class I railroads in the Southwest and [illegible] over 13% of the total tonnage originating on lines in Texas; that the freight charges on [illegible] state traffic in these commodities during [illegible] month's period in 1925 [illegible]

[illegible] Ex. A-61 [illegible] [illegible] [illegible] hundred [illegible] each southwestern State.

during a two-year period ending October 1, 1927, freight charges on shipments to the Louisiana Highway Commission in western Louisiana were over $800,000 and that on shipments to the Arkansas Highway Commission during 1926 freight charges were over $400,000. (R. 22.)

The Commission found the approximate values of the various considered commodities and that these values are among the lowest of any commodities transported. (R. 23-24.) It considered the relation of these low values to the transportation charge. (R. 54.) It found the number of tons of sand, gravel, and crushed stone used and sold in 1925 in Arkansas, Oklahoma, and Texas and the number of tons of sand, gravel, crushed stone, and shells used in 1926 in western Louisiana.[1] (R. 22.) It found that there were more than 300 producing points scattered throughout the Southwest. (R. 23.) The sources of supply in western Louisiana were established by the evidence and findings. (R. 23, 468, 474, 481-482; Ex. A-5, Bk. of Exs.) Since the commodities are chiefly used in the construction and maintenance of improved highways, the Commission's findings show the existing highway systems and contemplated new construction in Arkansas, Louisiana, Oklahoma, and Texas.[2] (R. 22-23.)

[1] Ex. A-134 (R. 1073) shows the production for each of these States for the years 1924, 1925, and 1926.

[2] Exs. A-4, A-74, A-76, A-79 (Bk. of Exs.) show in detail the highway systems of these States.

The Commission found the average loading of these commodities per car in the Southwest, the average length of haul, the percentage of this traffic moving intrastate and the approximate percentage in western Louisiana moving on Louisiana good roads rates. (R. 23–25.) In making these findings the Commission had before it figures of the shipments to the Louisiana Highway Commission in western Louisiana during a two-year period and the shipments to the Arkansas Highway Commission during 1926 itemized so as to show, between each point of origin and destination, total tonnage, total freight charges, and distance. (Ex. A–8, R. 859; Ex. A–9, R. 879; Ex. A–70, Bk. of Exs.) The interstate movement of cars over the Missouri Pacific and St. Louis Southwestern Lines was also shown. (Ex. A–95, R. 1037; A–110, R. 1056.)

The rate structure was thoroughly examined. A complete history of Arkansas, Louisiana, and Texas intrastate rates on these commodities was presented. (Ex. 22, R. 862; Ex. A–12, R. 900; A–44, R. 941; A–130, R. 1061.) In addition, the intrastate sand and gravel rates in Indiana, Illinois, Iowa, Kansas, Mississippi, Missouri, Oklahoma, and Wisconsin were introduced in evidence. (Ex. A–51, R. 959; Ex. A–80, R. 1034a; Ex. A–113, Bk. of Exs.) Interstate rates which the Commission had previously established in No. 9700, in the *Natchez Cake* and in *Railroad Commission of Louisiana v. A. H. T. Ry. Co.*, 22 I. C. C. 332, supra,

caused unjust discrimination against interstate commerce, to prescribe the maximum or minimum rate which, in its judgment, would remove such discrimination. Section 15a of the Commerce Act, which was also added by the Transportation Act, 1920, made it the duty of the Commission so to prescribe rates as to enable the carriers as a whole, or in groups selected by the Commission, to earn an aggregate annual net railway operating income equal to a fair return upon the aggregate value of the railway property used in transportation. With reference to this and other changes made by the Transportation Act, this Court said in *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U. S. 563, 585:

> The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in § 15a to be one of the purposes of the bill.

Carrier revenue is derived either from interstate or intrastate transportation. If interstate rates on a group of related commodities are established at a level which is no more than sufficient to enable them to contribute their share of the fair return on railroad property to which the carriers are entitled under the provisions of the Commerce Act, manifestly intrastate rates materially below this level applying on commodities moving intrastate

in substantial volume under [illegible] conditions increase the rate charged for interstate commerce and constitute an undue discrimination against interstate commerce within the meaning of Section 13 (4) of the Act. In [illegible] *Comm. v. C. B. & Q. R. R. Co.*, *supra*, this Court sustained an order of the Commission which prescribed the same intrastate rates as were applying to interstate commerce, and held that the Commission had properly determined that lower intrastate rates would discriminate against interstate commerce. The Court said (p. 536):

> If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates will have to be. The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system. Section 15a confers no power on the Commission to deal with intrastate rates. * * * When we turn to paragraph 4, § 13, however, and find the Commission for the first time vested with a direct power to remove "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce," it is impossible to escape the dovetail relation between that provision and the purpose of [illegible]. If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an undue,

unreasonable or unjust discrimination against interstate or foreign commerce," within the ordinary meaning of those words. It can not be doubted that the interstate rates which the Commission approved in this case were established at a level which merely sufficed to sustain their fair share of the transportation burden. They are lower than the rates which the Commission had approved for interstate transportation between points in the Southeast (R. 40, 62), although the Commission had previously recognized in numerous cases that rates in the Southwest may properly be somewhat higher than in the Southeast.[11] Moreover, these lower southeastern rates have been approved for intrastate application in Alabama, North Carolina, and within Kentucky and Tennessee, except the western portions thereof,[12] and they have been extended by an order of the Commission which this Court sustained (*Georgia Pub. Service Comm. v. United States*, 283 U. S. 765) for intrastate application throughout the State of Georgia. The interstate rates approved by the Commission in this case have been accepted as reasonable intrastate rates by three of the four State commissions which participated in the hearing. They are lower than the interstate rates previously prevailing in the Southwest. Two of the Interstate Commerce

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[11] *Southwestern Investigation*, 77 I. C. C. 473, 484; *Southwestern Rates Case*, 107 I. C. C. 381, 687–688; *Consolidated Southwestern Cases*, 188 I. C. C. 203, 382.

[12] *Eastern Class Rate Case*, 140 I. C. C. 309, 311.

Commissioners (this board [the case] were of the opinion that higher rates should have been approved. (R. 51-52.)

Special attention is directed to the fact that the rates of which appellants complain were lower than the rates which at the time of the hearing the Louisiana Public Service Commission was maintaining on commercial shipments of the same commodities.

The evidence and the findings clearly establish that the increase in Louisiana rates which the Commission ordered would substantially increase the carriers' revenues. The increase applies on shipments under the good-roads rates and the carriers' revenues under these rates was found. (R. 22.) It was also conclusively shown that the carriers' revenues would be increased by approximately the full extent of the increase in rates ordered by the Commission. The gravel, crushed stone, and shells used by the Louisiana Highway Commission are produced only in certain limited areas in western Louisiana. (*Supra*, pp. 7, 20.) Supplies could not be developed in new regions so as to eliminate the railroad haul. (*Supra*, p. 10.) Neither would higher freight charges cause the railroads to lose traffic to other carriers. There was no evidence of trucking competition in western Louisiana; the Commission found that these commodities are heavily loaded and move on low rates (R. 24, 49, 52); over 98% of the gravel used by the Louisiana Highway Commission in western Louisiana requires a

freight haul (*supra*, p. 10). Neither would the higher freight charges materially diminish the volume of the traffic affected. The expenditures for highway purposes in Louisiana averaged over $8,000,000 annually and the increase in freight charges on shipments to the Louisiana Highway Commission of about $140,000 a year resulting from the Commission's order is therefore less than 2% of the amount ordinarily spent on the highway systems of the State.[11]

Since the Commission determined the level of rates which represent a fair contribution to the maintenance of carrier income and an adequate transportation system, as required by the Act; since it determined the approximate amount of loss in revenue which would result from continuance of the existing Louisiana good-roads rates; since it found that there was no difference between interstate and intrastate transportation conditions which would warrant a different rate level, we submit that these findings and the evidence on which they rest adequately support its ultimate finding that lower Louisiana rates would result in unjust discrimination against interstate commerce. (See Section 14 of the Act, *infra* p. 40.)

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[11] During the years 1923, 1924, 1925, and 1926 about $32,345,000 was spent for highway purposes in Louisiana. (R. 430-433.) The freight charges on shipments to the Louisiana Highway Commission in western Louisiana during a two-year period were approximately $400,000 a year (R. 436) and 35% of this amount, representing the approximate increase in rates under the Commission's order, is $140,000.

Discrimination being a relative matter, and fact, the determination of the Interstate Commerce Commission is entitled to ... any substantial evidence ... *States*, 272 U. S. ..., *Commission* v. *Union Pacific R. R. Co.*, ... 541, 547-548.

The situation here differs radically from that presented in *Florida* v. *United States*, ... 194, where an order of the Commission prescribing minimum intrastate log rates was set aside. In that case there was no finding by the Commission, and no findings from which it could be inferred, that the increased intrastate rates which the Commission ordered would produce, or were likely to produce, additional income for the carriers. Since it was not shown or found that the Commission's order would remove discrimination against interstate commerce by increasing carrier revenue and since the Commission also made no finding that the traffic was carried at a loss, its order was invalid because not supported by adequate collateral findings. Furthermore, as this Court pointed out (p. 212), the Commission in that case, although it fixed intrastate rates for the entire State, "did not undertake to establish a state-wide level of rates for the interstate transportation of logs."

In many important aspects this case is similar to *Alabama* v. *United States*, 283 U. S. 772, where this Court sustained an order of the Commission requiring carriers to maintain intrastate rates at

Alabama for fertilizers and fertilizing materials not lower, for corresponding distances, than the intrastate rates prescribed by the Commission. In that case, as here, the Commission's order was entered to prevent undue prejudice to interstate shippers and unjust discrimination against interstate commerce resulting from lower intrastate rates. In that case, as here, the order was entered after an extended investigation by the Commission into interstate and intrastate rates over a wide contiguous territory on a single commodity group. In that case, as here, the State commissions concerned were directly represented in the hearing.

II

THE ORDER OF THE COMMISSION PRESCRIBING A MINIMUM RIVER-CROSSING ALLOWANCE FOR TRANSPORTATION OF SAND, GRAVEL, AND RELATED COMMODITIES BETWEEN WESTERN LOUISIANA AND POINTS IN LOUISIANA ON THE EAST BANK OF THE MISSISSIPPI RIVER IS VALID

Appellants attack the allowance for Louisiana Mississippi River crossings on three grounds—(1) as a preference of the ports of one State over those of another in violation of the Constitution; (2) as constituting a division of joint rates within the meaning of Section 15 (6) of the Interstate Commerce Act, which is invalid because the Commission did not meet the requirements of that section; and (3) as without support in the findings or evidence.

(1) Article 1, Section 9, Clause 6, of the Constitution provides:

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

Appellants contend that certain Texas ports are reached by means of bridges or ferries, and that it is violative of the above constitutional provision to require an additional charge for the Louisiana Mississippi River crossings while not requiring a like additional charge for the use of bridges or ferries serving certain Texas ports.

The clause in the Constitution does not apply to differences in regulation attributable to differences in "natural advantages." *Armour Packing Co. v. United States*, 209 U. S. 56, 80. Unless, therefore, the bridge or ferry service at Texas ports is comparable to the ferry service across the Mississippi River, a transportation allowance for the latter and not for the former is not an unconstitutional preference. The record does not show that any Texas port is reached by bridge or ferry; much less does it show similarity of the service there rendered with the transportation service across the Mississippi River.

Furthermore, this Court has indicated that the constitutional provision prohibits only preferences relating to the entry and departure of vessels or a direct preference of the ports of one State over those of another, but not incidental advantages re-

sulting from regulation of commerce. In *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 421, 435, this Court said:

> So far as the regulation of revenue is concerned, the prohibition in the clause does not seem to have been very important, * * * and, as to a preference by a regulation of commerce, the history of the provision, as well as its language, looks to a prohibition against granting privileges or immunities to vessels entering or clearing from the ports of one State over those of another. That these privileges and immunities, whatever they may be in the judgment of congress, shall be common and equal in all the ports of the several States. Thus much is undoubtedly embraced in the prohibition; and it may, certainly, also embrace any other description of legislation looking to a direct privilege or preference of the ports of any particular State over those of another. Indeed, the clause, in terms, seems to import a prohibition against some positive legislation by congress to this effect, and not against any incidental advantages that might possibly result from the legislation of congress upon other subjects connected with commerce, and confessedly within its power.

(2) Section 15 (6) of the Interstate Commerce Act (*infra*, p. 21) provides that the Commission when it "is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly

preferential and prejudicial as between the carriers parties thereto . . . shall by order prescribe the just, reasonable, and equitable division thereof to be received by the several carriers." These provisions do not apply to the present case because the Commission did not prescribe any division of the allowance for the river crossing among the several carriers parties thereto. The record does not show whether the carriers themselves performed this service or paid ferry companies therefor. But even if the charge could be considered joint, the Commission's order prescribed only the amount of the charge, not its division.

(3) Concerning allowances for Mississippi River crossings the Commission said:

> In No. 9702 . . . for the ferry service across the Mississippi River the addition of 20 constructive miles to the actual distances was authorized in constructing rates to and from Vicksburg and other east-bank crossings south thereof. In *Mileages for Mississippi Crossings*, 93 I. C. C. 462, the allowances for crossings south of Memphis were changed to specific arbitraries ranging from 6.5 cents per 100 pounds on first class traffic down to 2.5 cents per 100 pounds on class [illegible] traffic. (R. 24.)

It also said:

> In the recent general readjustment proceeding we authorized bridge arbitraries on specific commodities that would bear the same relationship to the first-class arbi-

and advocated. In *Natchez Chamber of Commerce v. L. & A. Ry. Co.*, 52 I. C. C. 105, 125–126, the Commission said:

> The proposal to add 20 miles is in consonance with the rule of the Louisiana railroad commission with respect to intrastate traffic which crosses the Mississippi River and is handled on distance rates. That commission through its counsel states on brief: "It has always been the practice in the state of Louisiana to permit the carriers to add for this transfer service an arbitrary of 20 miles in applying their distance tariff rates. And in naming specific rates this 20-mile allowance has been taken into consideration. . . . The figures presented by the carriers as to the cost of river transfer have been accepted by the Louisiana commission as substantially correct and seem to justify a continuance of the practice heretofore followed at the Mississippi River crossings in the state of Louisiana, allowing 20 miles in the case of mileage rates for the Mississippi River crossings."

On the hearing before the Commission counsel for appellants admitted that there was a 20-mile allowance in the Louisiana scale for river crossings. (Appellants' Brief, p. 61.)

The present proceeding covered rates between western Louisiana and points in Louisiana on the east bank of the Mississippi River. No. 9702 having been reopened, if the Louisiana authorities desired no river-crossing allowance or a lower allow-

ance than that prescribed on the original hearing, they should have introduced evidence to support this view. There is no such evidence in the record before this Court. It would therefore seem that appellants have not laid a proper foundation for their attack on the river-crossing allowance.

Georgia Public Service Comm. v. United States, 283 U. S. 765, *supra*, held that a party to a supplemental hearing before the Commission who did not there offer evidence of a change in conditions could not complain because the Commission did not in the later hearing redetermine a subsidiary issue upon which it had passed in the original hearing. We submit, therefore, that in the present case the Commission might have retained the 9702 scale for river-crossings. Appellants cannot complain that the Commission nevertheless granted them partial relief and adopted a lower scale for the river-crossing allowance.

CONCLUSION

It is respectfully submitted that the decree below should be affirmed.

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APPENDIX A

The Interstate Commerce Act, as amended, provides:

SEC. 3. (1) That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (c. 104, 24 Stat. 380; c. 91, 41 Stat. 479; U. S. C. title 49, sec. 3.)

SEC. 13. (3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, * * * there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, * * * the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is author-

ized and empowered, * * * to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act. (41 Stat. 484; U. S. C. title 49, sec. 13 (3).)

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as in its judgment will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding. (41 Stat. 484; U. S. C., title 49, sec. 13 (4).)

SEC. 14. (1) That whenever an investigation shall be made by said Commission, it

shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made. (c. 104, 24 Stat. 384; c. 3591, 34 Stat. 589; U. S. C., title 49, sec. 14 (1).)

SEC. 15. (6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, * * *. (c. 91, 41 Stat. 486; U. S. C. title 49, sec. 15 (6).)

SEC. 15a. (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish, or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures, and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have

reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country. (c. 91, 41 Stat. 488; U. S. C., title 49, sec. 15a (2).)

APPENDIX B

COMPARISON OF LOUISIANA GOOD-ROADS SINGLE-LINE SCALE AND INTERSTATE SINGLE-LINE SCALE APPROVED BY THE COMMISSIONER IN THESE PROCEEDINGS

1	2	3	4
Distance, miles.	Louisiana good-roads scale	Commissioner's scale	[illegible]
10	10	10	10
20	20	20	20
30	30	30	30
40	40	40	40
50	50	50	50
60	60	60	60
70	70	70	70
80	80	80	80
90	90	90	90
100	100	100	100
110	110	110	110
120	120	120	120
130	130	130	130
140	140	140	140
150	150	150	150
160	160	160	160
170	170	170	170
180	180	180	180
190	190	190	190
200	200	200	200
Average.	[illegible]	[illegible]	[illegible]